A **WAN MARZUKI WAN ABDULLAH**

v.

PP

B COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
AHMAD MAAROP JCA
SULAIMAN DAUD JCA
[CRIMINAL APPEAL NO: T-05-47-2003]
C 14 MAY 2008

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(2) - Trafficking in 3224.47 grams cannabis - Appeal against conviction and sentence - Whether there was actual delivery of drugs by appellant -* D *Whether learned judge erred in evaluation of defence story*

The appellant was convicted of the offence of trafficking in 3224.47 grams of cannabis contrary to s. 39B(2) of the Dangerous Drugs Act 1952. He appealed against his conviction and sentence. The defence submitted that there was no actual E delivery of the drug to the relevant person ('PW5'). Also, the judge erred on the facts when evaluating the defence submission in that the appellant met PW5 for the purpose of collecting a debt.

F **Held (dismissing the appeal)**
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) Whether there is actual delivery is a question of fact and G degree. It depends on the particular facts of an individual case. Varying fact patterns may be envisaged. An accused (as vendor) may physically hand the drug to the buyer (usually an *agent provocateur*). Or he may place it near the buyer. Or he may make it readily available for the buyer to take control of H it (*PP v. Sa'ari Jusoh*). Or he may place it in a vehicle or a room and hand the keys to the same to the buyer. In all these cases there is actual delivery. There may be cases where delivery is constituted by more than one act. In the present case, the acts of the appellant in bringing the drug to the I petrol station and placing it near PW5 when taken cumulatively constituted actual delivery. (para 5)

(2) The defence case was diametrically opposed to the prosecution's case. The issue which fell for the learned judge to decide was whether PW5 was telling the truth as to what was agreed, *ie*, whether the accused's version was reasonably probable. After a careful analysis of the totality of the evidence, the learned judge found the defence version to lack credibility. He also held that it did not raise a reasonable doubt in his mind. He found the accused's explanation to be one of recent invention because of the way in which the defence case was put to the witnesses for the prosecution. The judge was justified in doing so based on the facts. There was clear authority for the proposition that in an appeal of this nature that turned on questions of fact particularly in relation to issues of credibility, this court would be reluctant to interfere with the findings made by the primary trier of fact. (para 6)

Bahasa Malaysia *Translation Of Headnotes*

Perayu disabit dengan kesalahan mengedar 3224.47 gram kanabis di bawah s. 39B(2) Akta Dadah Berbahaya 1952. Beliau merayu terhadap kedua-dua sabitan dan hukuman. Dalam hujahnya, perayu menyatakan bahawa tidak wujud penyerahan sebenar dadah kepada penerima yang berkenaan ('PW5'). Dihujahkan seterusnya bahawa hakim khilaf di sisi fakta dalam menilai keterangan pembelaan yang menyatakan bahawa tujuan perayu berjumpa PW5 adalah bagi menuntut hutang.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Sama ada wujud penyerahan sebenar adalah satu persoalan fakta dan tahap. Ia bergantung kepada fakta tertentu sesuatu kes. Rupa bentuk fakta pula mungkin berbeza-beza. Seorang tertuduh (selaku penjual) mungkin telah meyerahkan secara fizikal dadah kepada pembeli (biasanya seorang *agent provocateur*). Atau beliau mungkin meletakkannya dekat pembeli. Atau ia mungkin meletakkan dadah di bawah kawalan pembeli *(PP v. Sa'ari Jusoh)*. Atau ia mungkin meletakkannya di dalam kenderaan atau di dalam bilik dan kemudian menyerahkan kuncinya kepada pembeli. Dalam semua kes-kes ini wujud penyerahan sebenar. Mungkin juga terdapat kes-kes di mana penyerahan diserlahkan melalui beberapa perlakuan. Dalam kes

A semasa, perlakuan-perlakuan perayu dalam membawa dadah ke stesyen minyak dan meletakkannya dekat PW5, dilihat secara kumulatif, adalah penyerahan sebenar.

(2) Kes pembelaan adalah bertentangan samasekali dengan kes
B pendakwaan. Isu yang perlu dijawab oleh yang arif hakim adalah sama ada PW5 berkata benar mengenai apa yang dipersetujui, iaitu sama ada versi tertuduh mungkin betul secara munasabahnya. Selepas meneliti keterangan pada keseluruhannya, yang arif hakim mendapati tidak ada kredibiliti pada versi
C pembelaan. Beliau juga mendapati bahawa versi tersebut tidak membangkitkan keraguan munasabah pada pemikirannya. Menurut beliau penjelasan tertuduh adalah satu rekaan semata-mata, mengambilkira cara bagaimana kes pembelaan tersebut diajukan kepada saksi-saksi pendakwaan. Berdasarkan fakta,
D hakim mempunyai justifikasi untuk mengambil pendirian sedemikian. Juga terdapat autoriti jelas mengenai proposisi bahawa dalam rayuan yang seperti ini yang tertumpu kepada persoalan fakta dan terutamanya berhubung isu-isu berkaitan kredibiliti, mahkamah ini keberatan untuk campur tangan dalam
E dapatan-dapatan yang dibuat oleh pengadil utama fakta.

Case(s) referred to:
Andy Bagindah v. PP [2000] 3 CLJ 289 CA ***(refd)***
PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(refd)***

F **Legislation referred to:**
Dangerous Drugs Act 1952, s. 39B(2)

For the appellant - Dato' Sukri Hj Mohamed; M/s Wan Harun Sukri & Nordin
For the respondent - Eddie Yeo Soon Chye; AG's Chambers

G

[Appeal from High Court, Kuala Terengganu; Criminal Trial No: 45-03-2000]

Reported by Usha Thiagarajah

H

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

I **[2]** The appellant (accused in the court below) was convicted of the offence of trafficking contrary to s. 39B(2) of the Dangerous Drugs Act 1952 ("the Act"). He has appealed against conviction and sentence. The facts relevant to this appeal are as follows.

[3] According to the prosecution, pursuant to an arrangement made by PW8 an informer, PW5 (Detective Corporal Mahmood bin Noor) met with the appellant on 19 December 1999 for the purpose of negotiating the sale and purchase of cannabis. According to PW5, it was agreed that the accused would make available 5 kg of cannabis at the agreed price of RM900 per kg. It was also agreed that the transaction would be completed on 21 December 1999. The evidence led by the prosecution shows that at about 5.30pm on the date in question, PW5 was at a petrol station at Bukit Jong, Kuala Terengganu. Shortly later the appellant arrived. He was holding a blue bag (exh. P11). From it he took out a pink coloured bag (exh. P10). PW5 was able to smell cannabis. He then asked the appellant to replace exh. P10 in P11. The appellant did so. Exhibit P11 was placed by the appellant on the cement floor near PW5. PW5 then gave the agreed signal to the police party who were by prior arrangement waiting in ambush nearby. The appellant was arrested. The contents of exh. P10 was sent to the chemist. A chemical analysis of the contents of exh. P10 established the same to be 3224.47 grams of cannabis. Acting on this evidence, the learned trial judge called upon the appellant to make his defence. The appellant's story was that the informer PW8 had owed him money and that the meeting on 21 December 1999 was for the purpose of his collecting his debt from PW8. The learned judge did not accept the defence version. He accordingly convicted the accused and imposed upon him death penalty.

[4] Before us learned counsel for the appellant raised two principal arguments in support of the appeal. His first submission is that the acts of the appellant did not constitute a sale of drug in question to PW5. Counsel correctly submitted that it was the prosecution's case that there had been a sale of the cannabis in question to PW5. For there to be a sale there must as a matter of law, argues learned counsel, be actual delivery of the proscribed drug. He referred us to the decision of the Federal Court in *PP v. Sa'ari Jusoh* [2007] 2 CLJ 197. In that case the Federal Court held that there must be an actual delivery of the proscribed drug for there to be a sale. Learned counsel submitted that on the facts of this case there had been no actual delivery. With respect we do not agree with this submission.

[5] In our judgment whether there is actual delivery is a question of fact and of degree. It depends on the particular facts of an individual case. Varying fact patterns may be envisaged. An accused (as vendor) may physically hand the drug to the buyer (usually an *agent provocateur*). Or he may place it near the buyer. Or he may make it readily available for the buyer to take control of it as happened in *Sa'ari Jusoh.* Or he may place it in a vehicle or a room and hand the keys to the same to the buyer. In all these cases there is actual delivery. There may be cases where delivery is constituted by more than one act. Take this very case. The acts of the appellant in bringing the drug to the petrol station and placing it near PW5 when taken cumulatively constitute actual delivery.

[6] The second point taken by learned counsel for the appellant is that the judge erred in his handling of the facts when evaluating the defence story. It is clear from the record that the defence case was diametrically opposed to the prosecution's case. The issue which fell for the learned judge to decide was whether PW5 was telling the truth as to what was agreed, that is to say, whether the accused's version was reasonably probable. After a careful analysis of the totality of the evidence the learned judge found the defence version to lack credibility. He also held that it did not raise a reasonable doubt in his mind. He found the accused's explanation to be one of recent invention because of the way in which the defence case was put to the witnesses for the prosecution. In our judgment the judge was certainly entitled to do that. On the facts of this case he was justified in so doing. There is clear authority for the proposition that in an appeal of this nature which turns on questions of fact particularly in relation to issues of credibility, this court will be reluctant to interfere with the findings made by the primary trier of fact. We need go no further than to quote the following passage from the judgment of Shaik Daud JCA in *Andy Bagindah v. PP* [2000] 3 CLJ 289:

> There is no dearth of authorities to say that in every case, there are bound to be contradictions and discrepancies. The question to be decided by the trial judge is whether those contradictions and/or discrepancies are material ones so as to strike at the very root of the charge. It is for the trial judge to consider this since he was the one who saw and heard the evidence. In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the

credibility of witnesses, we held that the learned judge was a better person to decide and an appellate court ought not to interfere with such findings.

[7] For the reasons already given this appeal is devoid of any merit. It is dismissed. The conviction entered and the sentence passed by the High Court are hereby affirmed.